APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS IN THE INSTANT CASE.

No. 15097

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THE TIMKEN ROLLER BEARING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION to Review a Decision of the National Labor Relations Board.

Decided December 21, 1963.

Before: MILLER and WEICK, Circuit Judges, and W. E. MILLER, District Judge.

MILLER, Circuit Judge. The petitioner, The Timken Roller Bearing Company, hereinafter referred to as the "Company," seeks to set aside an order of the National Labor Relations Board issued on August 3, 1962, which held that petitioner violated Sections 8(a)(5) and (1) of the National Labor Relations Act, Section 158(a)(5) and (1), Title 29, United States Code. The Board in its answer to the petition has requested enforcement of its order. It is agreed by the parties that the court has jurisdiction of the proceeding.

This is a so-called "wage data" case, in which the Company is charged with having illegally refused to com-

ply with the Union's request for information relating to the method used to establish the wages received by its employees. The Company's refusal to comply with this request is alleged to have been a refusal to bargain in good faith, thereby constituting an unfair labor practice, in violation of Section 8(a)(5). The violation of this section of the Act in turn results in the Company engaging in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

The Company, an Ohio corporation, maintains its principal office and place of business in Canton, Ohio, where it is engaged in the manufacture, sale and distribution of roller bearings. For many years the Union* has been the bargaining representative of the production and maintenance workers at the Company's plant at Canton, Ohio. Each product and operation performed in the plant carries a fixed wage rate, which is determined by a very complex system of detailed time studies, operation observations, personal motions recordings and a myriad set of detailed evaluations of every separate element and aspect of the production process. The basic and precise elemental factors considered were all reduced to writings called time-study sheets. As the changing needs of the Company develop, old methods are re-evaluated, new products are conceived, improved and more efficient methods are evolved, and, in consequence of successive studies and evaluations of work effort by the individual employee operators, changed basic time studies are produced and new and different wage rates established.

The Company's practice of using this complex technique for establishing the wage structure of the employee has been recognized in bargaining contracts between the

---

* United Steelworkers of America, AFL-CIO, and its Local No. 1123

parties prior to the contract involved in the present case, which was executed February 21, 1960. The 1960 contract provides that the wage structure in existence at the moment the current contract is signed shall be frozen for the duration of the agreement except as changed during its life pursuant to the contract provisions themselves. Article V, paragraph B, provides with respect to new rates:

> "It is recognized that the Company at its discretion may find it necessary or desirable from time to time to establish new wage rates or to adjust existing wage rates because of any of the following circumstances: * * *."

The contract thereafter lists six "circumstances," such as changes or improvements made in equipment, new or changed standards of manufacture, establishment of changed or new occupations in the plant, and the introduction of new products and additions to the present line of products in the plant. Under Article V, paragraph C, the Company agrees that when it deems it necessary or desirable to establish a new wage rate, it shall develop and install the new rate in accordance with the Company's practice in effect on the date of the agreement. Article V, paragraph C, also provides that a grievance may be filed by any employee who is affected by such new rate. Article IX sets forth the procedure for adjustment of grievances, which includes four successive steps, the last of which is arbitration.

In the summer of 1960, among the pending grievances, there were five directly arising from newly established wage rates, which the employees contended were a reduction of rates and improperly established under the contract. These five pending grievances had proceeded beyond the third step of the grievance procedure as far back as the

summer of 1959 and awaited hearings before a chosen arbitrator in each instance. They were held in abeyance as the parties met in negotiation sessions aimed at a renewal of the 1956 contract due to expire on August 24, 1959. A new two-year contract was signed on February 21, 1960. There is no substantial difference, in terms of wage provisions or grievance procedures, between the two agreements.

On July 18, 1960, the Union wrote a letter to the Company in which it requested wage rate information relating to the grievances involved in all five of the pending arbitration cases referred to above. This request included the original time study sheets and other documents relative to both the prior rates and the new rates, all other data and information which was used to determine the rate of pay for each job, and all documents, studies and other information that were used to evaluate such job, both prior to the change and thereafter, including full information as to the weights given to each factor used to arrive at a final decision on the established rate and what factors were considered in making such decision. It explained that this information was needed because "each of these cases protest the institution of new reduced rates in place of rates theretofore in effect and/or the adequacy, fairness and method of establishment of new rates in their stead." The letter further requested the Company to supply time study manuals, instructions and procedures used in the making of time studies of jobs in the plants. The letter stated that the information requested was necessary to the Union so that it might intelligently evaluate the various rates of pay in the plants, especially as they may be changed from time to time, and "to properly administer the contract."

The Company responded to the Union's request by letter of August 1, 1960, in which it stated that it would

not comply with the request. The Union repeated its demand by letter of August 29. The Company again denied the request by letter of September 15. The Company's position was that its obligation to bargain with the representative of its employees, once the contract had been entered into, was to bargain on matters covered by the contract in the manner of bargaining prescribed by the contract; that it had no obligation to agree to any modification of the terms and conditions contained in the contract as long as it remained in effect; that the contract contained adequate provisions for the discussion and settlement of any and all grievances arising under the contract that dealt with the establishment of new rates; that if there was any information that the Union needed for the proper disposition of the listed rate grievances, it was its obligation to secure this information in accordance with the grievance provisions of the contract; and that under the contract, employees working under a new rate might choose to either file a grievance or not to do so, and that it was only when a grievance was filed that the Union had any responsibility with regard to the new rate, and then its interest was confined to the newly established specific rate and not to the rate structure in general. The Company stated that it was willing to proceed with respect to rate grievances strictly in conformity with the 1956 and 1960 agreements, whichever was applicable, but it was not interested in negotiating a new contract dealing with the subject of rate establishment. In two grievances which went to arbitration the Company's action was consistent with this position, in that it declined to furnish requested wage information unless the arbitrator ruled that it was required to do so. In one of these matters the arbitrator ruled that the Company was not required to furnish the information requested. In the other matter the arbitrator

asked the Company to deliver some of the requested wage data to the Union and the Company complied with this direction.

Following a charge by the Union on November 25, 1960, a complaint was issued on January 5, 1961, by the Regional Director of the National Labor Relations Board alleging that the Company had committed an unfair labor practice affecting commerce within the meaning of Section 8(a)(1) and (5) of the Act. Following the filing of an answer by the Company and a hearing, the Board concurred in the findings and rulings of the Trial Examiner and issued its order of August 3, 1962, directing the Company to cease and desist from refusing to bargain collectively with the Union by refusing to furnish to the Union information and data concerning time studies and methods used for establishing wage rates, and affirmatively directing the Company to furnish such time studies, wage data and information to the Union upon request. This is the order which is before us on review.

It appears to be well settled that an employer is guilty of an unfair labor practice in refusing to bargain collectively as required by Sections 8(a)(5) and 8(d) of the Act, by refusing to furnish relevant wage information and data requested by a union as the certified representative of the employees in connection with negotiations for a collective bargaining agreement. *N. L. R. B. v. J. H. Allison & Co.*, 165 F. (2) 766, C. A. 6th, cert. denied, 335 U. S. 814; *N. L. R. B. v. Hekman Furniture Co.*, 207 F. (2) 561, C. A. 6th; *N. L. R. B. v. John S. Swift Co.*, 277 F. (2) 641, 645, C. A. 7th; *N. L. R. B. v. Leland-Gifford Co.*, 200 F. (2) 620, 624, C. A. 1st; *N. L. R. B. v. Yawman & Erbe Mfg. Co.*, 187 F. (2) 947, C. A. 2nd. See also: *N. L. R. B. v. Truitt Mfg. Co.*, 351 U. S. 149.

The cases also hold that this right to relevant wage information and data is not limited to the period during which the employer and the union are engaged in negotiations for a collective bargaining agreement, but includes the processing of a grievance under the bargaining agreement and the union's bona fide actions in administering the bargaining agreement during the period of its existence. *J. I. Case Company v. N. L. R. B.*, 253 F. (2) 149, 155, C. A. 7th; *N. L. R. B. v. F. W. Woolworth Co.*, 352 U. S. 938, reversing *N. L. R. B. v. F. W. Woolworth Co.*, 235 F. (2) 319, C. A. 9th; *N. L. R. B. v. Otis Elevator Co.*, 208 F. (2) 176, C. A. 2nd; *N. L. R. B. v. Whiting Machine Works*, 217 F. (2) 593, 594, C. A. 4th, cert. denied, 349 U. S. 905; *N. L. R. B. v. Item Company*, 220 F. (2) 956, 958, C. A. 5th, cert. denied, 350 U. S. 836, rehearing denied, 350 U. S. 905; *Boston Herald-Trav. Corp. v. N. L. R. B.*, 223 F. (2) 58, 63, C. A. 1st.

The Company contends that although the Union may have the right to such wage information, such right can be waived, and, in fact, was waived by the Union in the negotiations leading up to the execution of the collective bargaining agreement on February 21, 1960.

In the negotiations preceding the execution of that agreement the Union submitted a proposal which required the Company to furnish the kind of information now sought by it. This proposal was rejected by the Company. The Union, however, continued unsuccessfully to press this proposal. It was not included in the bargaining agreement as finally executed. The Company contends that this constituted a waiver of the right of the Union to demand and obtain such data. *N. L. R. B. v. Jacobs Mfg. Co.*, 196 F. (2) 680, C. A. 2nd; *N. L. R. B. v. Nash-Finch Co.*, 211 F. (2) 622, 626, C. A. 8th; *International News Service Div. of the Hearst Corp.*, 113 N. L. R. B. 1067.

This reasoning would probably be applicable if the right or benefit sought by the Union was a right or benefit which could only be acquired by virtue of the bargaining agreement. Under such circumstances a failure to include it in the agreement necessarily results in a failure to acquire it *United States Steel Corp. v. Nichols*, 229 F. (2) 396, 399-400, C. A. 6th, cert. denied, 351 U. S. 950.

However, in this case we agree with the Board that the Union's right to wage information it needed to administer the bargaining agreement was a right which it had under Section 8(d) of the National Labor Relations Act, Section 158(d), Title 29, United States Code, and the existence of this right was not dependent upon it being included in the bargaining agreement. It was not a right obtained by contract, such as would be the case in increased wages, longer vacations, pension rights, and certain so-called fringe benefits. The failure to have the right recognized by the Company in the bargaining agreement, which would probably eliminate the necessity of possible litigation over it later, does not mean that it does not exist by virtue of the statute.

The Company challenges the characterization of this right as a statutory right in that no statute expressly so provides. Although Section 8(d) of the Labor Relations Act does not expressly so provide, it has been construed by the cases hereinabove referred to as providing such a right, and we find no error in characterizing it as a statutory right. It was so characterized in *N. L. R. B. v. Yawman & Erbe Mfg. Co., supra*, 187 F. (2) 947, 949, C. A. 2nd. See also: *California Portland Cement Co.*, 101 N. L. R. B. 1436.

Even so, we recognize that the Union could have relinquished this right under the provisions of the bargaining agreement if it, as a part of the bargaining process, elected

to do so. But such a relinquishment must be in "clear and unmistakable" language. *Tide Water Associated Oil Company*, 85 N. L. R. B. 1096; *N. L. R. B. v. Item Company, supra*, 220 F. (2) 956, 958-959, C. A. 5th, cert. denied, 350 U. S. 836, rehearing denied, 350 U. S. 905. Silence in the bargaining agreement on such an issue does not meet this test. This Court said in *N. L. R. B. v. J. H. Allison & Co., supra*, 165 F. (2) 766, 768, C. A. 6th, cert. denied, 335 U. S. 814, "Nor do we see logical justification in the view that in entering into a collective bargaining agreement for a new year, *even though the contract was silent* upon a controverted matter, the union should be held to have waived *any rights secured under the Act*, including its right to have a say-so as to so-called merit increases." (Emphasis added.) We are of the opinion that the execution of the 1960 bargaining agreement, which was silent on this controversial question did not constitute a relinquishment of the Union's statutory right to the wage information which it now seeks. *N. L. R. B. v. Hekman Furniture Co., supra*, 207 F. (2) 561, C. A. 6th; *N. L. R. B. v. Otis Elevator Co., supra*, 208 F. (2) 176, 179, C. A. 2nd; *N. L. R. B. v. Yawman & Erbe Mfg. Co., supra*, 187 F. (2) 947, 949, C. A. 2nd.

The Company further contends that although the Union may have the right to certain relevant and material wage information, it does not have an unlimited right to information generally from the Company's books, and in the event the Company refuses to honor the Union's demand, the enforcement of the claimed right must be through the grievance procedure provided by the bargaining agreement, which terminates with arbitration. In other words, it is for the arbitrator to decide whether the Company's refusal to furnish the information is justified under the particular circumstances involved, and that neither the

Board nor the Court has the authority to decide this issue. It is argued that the demand by the Union, the refusal of the Company to comply with the demand, and the Union's attempt to enforce its claimed right is a "complaint," which under the provisions of the bargaining agreement must be channeled through Article IX of the bargaining agreement, which provides the procedure for the adjustment of "complaints or grievances." *United Steelworkers v. American Manufacturing Co.*, 363 U. S. 564; *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U. S. 593; *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, frequently referred to as the trilogy of cases. In this connection it is pointed out that although the Company contends the Union is not entitled to the information, it is willing to submit the matter to arbitration under Section IX of the bargaining agreement and to comply with the arbitrator's ruling. It takes the position that it is an intrinsic contradiction for the Court to say that although the employer is required by his contract to arbitrate complaints and grievances, his "willingness to abide by and faithfully carry out the terms of his contract becomes itself a failure to bargain." *Sinclair Refining Co. v. N. L. R. B.*, 306 F. (2) 569, 575, C. A. 5th. As the Court said in *N. L. R. B. v. Nash-Finch Co., supra*, 211 F. (2) 622, 627, C. A. 8th, "The respondent, we think, may not be convicted of an unfair labor practice for doing no more and no less for its union employees than its collective bargaining agreement with them called for."

The soundness of this reasoning, of course, depends upon whether the demand by the Union and the Company's refusal to honor it constitutes a complaint or grievance within the provisions of Section IX of the bargaining agreement. If it is not within the provisions of Section IX, arbitration of the issue is not required and the Company's

insistence upon arbitration is unjustified. *Atkinson v. Sinclair Refining Co.*, 370 U. S. 238, 241-243.

Article IX of the bargaining agreement deals with "Adjustment of Grievances." Paragraph E thereof states:

> "The parties agree that the provisions of this Article IX provide adequate means, if followed, for the adjustment and disposition, of any complaints or grievances."

It then provides:

> "Any employee who has a complaint concerning wages, hours and working conditions that directly affect him at the time of such complaint, may discuss the alleged complaint with his immediate supervisor in an attempt to adjust it and if such complaint is not adjusted to his satisfaction shall be entitled to file and process a grievance as provided in this Article, 'Adjustment of Grievances.'"

The grievance procedure consists of three successive steps, followed by a fourth step consisting of arbitration if the grievance is not adjusted in the prior proceedings. Each of these steps refers to a "grievance" of an "employee." It is provided in Step 3 of the Agreement, "Only grievances involving the interpretation or application of this agreement or disciplinary action are eligible for appeal to arbitration. * * *"

The Company's contention that the request of the Union for wage information and the refusal of the Company to supply it in the absence of an order to do so constitutes a complaint or a grievance which is subject to arbitration under the terms of the collective bargaining agreement is in our opinion, unsound for the following reasons.

First, Article IX provides that only grievances involving the interpretation or application of the agreement (or disciplinary action, which is not applicable here) is eligible for appeal to arbitration. As hereinabove pointed out, the

right of the Union to wage information was not acquired through the bargaining agreement. Whether the demand of the Union should be honored, accordingly, does not involve the interpretation or application of the agreement which is necessary in order to be eligible for arbitration, but, on the contrary, involves the interpretation and application of the National Labor Relations Act.

Secondly, Step 1 of the grievance procedure provided by Section IX is expressly limited to "An employee who has not been able to adjust his grievance with his immediate supervisor." Thereafter, Steps 2, 3 and 4 (arbitration) deal with this same employee grievance. We do not construe the claim of the Union in the present case as being such an employee grievance. *Local Union No. 998, etc. v. B. & T. Metals Co.*, 315 F. (2) 432, 437, C. A. 6th. It was not limited to the settlement of pending grievances. It was also for the purpose of enabling it to "intelligently evaluate the various rates of pay in the plants" and "to properly administer the contract." Without this information it would be difficult, if not impossible, as a practical matter to evaluate a new rate, to check on the fairness of the Company's determination, and to determine whether an employee had a valid grievance which should be asserted. With such information the Union is in a better position to advise an employee about his rights, to reject those employee claims which are not supported by the facts, and to protect the rights of employees generally in properly administering the contract. *Sinclair Refining Co. v. N. L. R. B., supra*, 306 F. (2) 569, 571, C. A. 5th. As stated in *Conley v. Gibson*, 355 U. S. 41, 45, the bargaining representative's duty does not come to an abrupt end with the making of an agreement between the union and the employer, but collective bargaining is a continuous process involving both matters not covered by the existing agree-

ment and the protection of employee rights already secured by contract.

The Company, in support of its contention, relies strongly upon *Timken Roller Bearing Co. v. N. L. R. B.*, 161 F. (2) 949, C. A. 6th, and *Sinclair Refining Co. v. N. L. R. B., supra*, 306 F. (2) 569, C. A. 5th.

In the *Timken Roller Bearing Co.* case it was held that the company had not refused to bargain in insisting that the dispute over its right to subcontract, which it claimed was a function of management over which the union had no jurisdiction, be handled through the grievance procedure provided by the contract. This ruling was based upon the fact that the bargaining agreement contained a provision that should "differences arise between the Company and the Union as to the meaning and application of the provisions of this agreement" such "differences" should be settled within the grievance procedure. It was held in that case that the dispute over the company's right to subcontract was such a "difference" and that the company, accordingly, had the right to insist on that procedure being followed. In the present case, although the dispute between the Company and the Union over the right to wage information and data is a "difference," it is not a difference or a grievance "involving the interpretation and application of the provisions of" the bargaining agreement, and, accordingly, the Company did not have the right to insist on use of the grievance procedure. We find no conflict between the cases.

In the *Sinclair Refining Co.* case the employer demoted two employees "because of lack of work," which, under the bargaining agreement, was not subject to arbitration. The union filed a grievance which claimed that the alleged "lack of work" was the result of contractually wrongful assignment or allocation of work. The employer

conceded that since a dispute existed between it and the union, it was subject to arbitration under the provisions of the bargaining agreement, but insisted that on the merits the union had no right to challenge or question its action in any way. While the grievance was in the first two steps the union demanded certain wage information and data. The employer refused to furnish this data on the ground that since the demotion was exclusively a management function not subject to challenge by the union, the data sought, even if otherwise relevant, was wholly immaterial. This resulted in the institution of an unfair labor practice proceeding. The Labor Board ruled that the employer had failed to bargain in good faith in refusing to furnish the information demanded. However, the Court of Appeals denied enforcement of its cease-and-desist order. The Court held that the Board proceeding could not be used to secure data for use in a grievance proceeding where determination of relevance and pertinency required determination of the critical substantive issue of the grievance itself, which issue was under the bargaining agreement for the arbitrator, not the Board or the Court. This is but another example of the now established law that where a dispute or "difference" is subject to grievance procedure and arbitration by reason of the provisions of the bargaining agreement, that procedure is exclusive and will be enforced. In the present case, as we have pointed out, the dispute or "difference" is not subject to the grievance procedure and arbitration provided by the bargaining agreement. This distinction was recognized and applied by the same court and the same opinion writer in *Local Union No. 787, etc. v. Collins Radio Co.*, 317 F. (2) 214, 219-220, C. A. 5th. The opinion in the *Collins Radio Co.* case also answers the company's contention that the Supreme Court's recent trilogy opinions, herein above referred to, require a different ruling from what we have reached.

It is for the Court, not the arbitrator, to decide whether a claim is an arbitrable one under the bargaining agreement. *Atkinson v. Sinclair Refining Co.*, *supra*, 370 U. S. 238, 241; *Local Union No. 998, etc. v. B. & T. Metals Co.*, *supra*, 315 F. (2) 432, 436, C. A. 6th. We are of the opinion that the claim of the Union for wage information and data was not an arbitrable one and that the Company was not justified in refusing to give the Union wage information on that ground.

We are also of the opinion that the good faith belief of the Company that it was not required to bargain with the Union is no defense to a refusal to bargain. *N. L. R. B. v. Wooster Div. of Borg-Warner Corp.*, 356 U. S. 342, 349; *International Ladies' Garment Workers' Union, etc. v. N. L. R. B.*, 366 U. S. 731, 739; *Old King Cole, Inc. v. N. L. R. B.*, 260 F. (2) 530, 532, C. A. 6th.

The petition to set aside the order of the Board is denied and enforcement of said order is decreed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS IN THE INSTANT CASE.

(Filed December 21, 1963.)

On petition for review and cross-petition for enforcement of an order of the National Labor Relations Board.

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the petition to set aside the order of the Board is denied and enforcement of said order is decreed.

Approved for entry:

s/ SHACKELFORD MILLER, JR.,

United States Circuit Judge.

DECISION OF THE NATIONAL LABOR RELATIONS BOARD IN SINCLAIR REFINING CO. CASE.

(145 NLRB No. 68, D-5789, Houston, Texas.)

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD.

Case No. 23-CA-1499.

SINCLAIR REFINING COMPANY
AND
OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION, AFL-CIO.

DECISION AND ORDER.

On July 2, 1963, Trial Examiner Ramey Donovan issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the Intermediate Report attached hereto. Thereafter the General Counsel and the Charging Party filed exceptions to the Intermediate Report and supporting briefs, and the Respondent filed a brief in support of the Intermediate Report.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations to the extent consistent herewith.

The Trial Examiner recommended dismissal of the complaint herein, which alleges that the Respondent violated Section 8(a) (5) and (1) of the Act by its refusal to furnish data sought by the Union in connection with the processing of certain grievances under the contractual grievance procedure. While we do not adopt all of the Trial Examiner's reasoning, we shall adopt his recommendation that the complaint be dismissed in view of the facts that the parties had agreed to arbitrate the grievances and had selected the arbitrator; that the Respondent expressed its willingness to supply any data the arbitrator ruled was necessary; that the Respondent did furnish data in accord with the rulings of the arbitrator; and that the arbitration hearings on the grievances in question were completed before the instant case came on for hearing before the Trial Examiner.

The decision not to issue a remedial order does not mean that we are affirming the Trial Examiner's opinion that, as the Respondent sought to channel the bargaining process within the framework agreed upon by the parties in their agreement, there has not been a violation of Section 8(a) (5) and (1) in this case. The Trial Examiner relied on *Hercules Motor Corporation*[1] as establishing the proposition that a union is not entitled to information which it seeks in a dispute over interpretation of a contract provision. This reads more into *Hercules* than was intended. In *The Timken Roller Bearing Company*,[2] in which the refusal to furnish the requested data was held to be a violation, Chairman McCulloch and Member Brown pointed out, in footnote 4, that the basic issue in *Hercules* was whether the matter in dispute was arbitrable, and that

---

[1] 136 NLRB 1648.

[2] 138 NLRB 15.

the issue of arbitrability should be decided by the arbitrator, not the Board.[3] Although arbitrability is a matter of contract interpretation, *Hercules* did not hold that every request for information in the context of a dispute over the meaning of a contract provision may only be disposed of under the grievance-arbitration process established by the contract. The existence or utilization of a grievance-arbitration clause does not relieve an employer of its duty to furnish a union with information needed to perform its statutory functions. Indeed, *Timken* specifically distinguishes *Hercules* in pointing out that the respondent in *Timken* had not met its bargaining obligation when it denied information which was relevant to the union's responsibility "in policing or administering a contract, or adjusting a grievance." In any event, however, we deem it unnecessary to determine whether there has been a violation of Section 8(a) (5) and (1) of the Act as the special circumstances adverted to above impel us to the conclusion that it would not effectuate the policies of the Act to issue a remedial order in this case. Accordingly, we shall dismiss the complaint.

ORDER

IT IS HEREBY ORDERED that the complaint filed herein be, and it hereby is, dismissed.

Dated, Washington, D. C., Dec. 30, 1963.

FRANK W. MCCULLOCH, *Chairman*,
BOYD LEEDOM, *Member*,
GERALD A. BROWN, *Member*,
National Labor Relations Board.

(SEAL)

---

[3] See also *Perkins Machine Company*, 141 NLRB No. 11, at p. 7 of the Intermediate Report.

INTERMEDIATE REPORT OF TRIAL EXAMINER IN SINCLAIR REFINING CO. CASE.

INTERMEDIATE REPORT

STATEMENT OF THE CASE

The above-named Union filed a charge against the above-named Company Respondent on September 26, 1962. The charge alleged a refusal to bargain since, on or about, April 11, 1962, in violation of Section 8(a)(1) and (5) of the Act. Under date of February 20, 1962, the General Counsel of the Board, acting through the Regional Director of the Twenty-third Region of the Board, issued a complaint against Respondent. In substance, the complaint alleges that, since April 11, 1962, Respondent has refused to produce, in response to requests by the Union, plant and personnel records reflecting Respondent's past practices pertaining to deductions from vacation allowances of employees in the bargaining unit. It is further alleged that the aforementioned information is sought by the Union for the purpose of processing and evaluating various grievances and that Respondent's refusal to make such information available is violative of Section 8(a)(1) and (5) of the Act. In its answer and in other pleadings, Respondent, in substance, denies the commission of unfair labor practices.

A hearing was held before Trial Examiner Ramey Donovan at Houston, Texas, on April 3, 24, and 25, 1963, with all parties represented and participating.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. The business of Respondent Company

Respondent is a corporation organized under the laws of the State of Maine, with its principal offices located in

New York, New York. Respondent refines and markets crude oil and derivative petroleum products. In its business, Respondent operates and maintains refineries in various States including, among others, refineries at East Chicago, Illinois; Marcus Hook, Pennsylvania; and Houston, Texas. Respondent also operated and maintained a refinery at Corpus Christi, Texas, until about May 31, 1962, at which time it ceased that operation.

In the 12-month period preceding the complaint, a representative period, Respondent refined petroleum products valued in excess of $1,000,000 at its refineries in East Chicago, Marcus Hook, and Houston. During this same period, Respondent sold and shipped from each of said refineries, to points located outside the respective States in which the refineries are located, products valued in excess of $100,000.

Respondent is engaged in commerce within the meaning of the Act.

II. The labor organization involved

The Union, previously referred to, is a labor organization within the meaning of the Act.

III. The alleged unfair labor practices

1. The events up to and including March 23, 1962

Respondent and the Union have had a bargaining and contractual relationship for over 20 years. A strike occurred in the summer of 1961 and an aftermath thereof was a National Agreement, effective July 27, 1961, between Respondent and the Union. This is the contract that is pertinent to the issues in the instant case.

Article IX of the contract is captioned, "Vacations" and it deals with that subject in seven numbered paragraphs or sections. Section 6 thereof reads as follows:

Time lost through absences during which an employee is not in receipt of wages shall be accumulated, and, if in the aggregate such absences equal or exceed twenty-two (22) scheduled work days, an employee's vacation allowance or wages shall be reduced one-twelfth (1/12th) for each twenty-two (22) work days of absence. This provision, however, shall not apply to:

(a) Processing and handling of employees grievances and arbitration, or

(b) Attending annual union convention, Employer national or supplemental contract negotiations or

(c) Leave of absence * * *

(d) [Waiting period of sickness and accident benefits plan].

Article XXVI is entitled, "Grievance and Arbitration Procedure" and under "Definition" it is stated that "a grievance is defined to be any difference regarding wages, hours, or working conditions between the parties hereto or between the Employer and an employee covered by this working agreement which might arise within any plant or within any region of operations." The grievance procedure sets forth the following steps:[1] (1) Employee aggrieved, either alone or with union committeeman, takes up matter with his foreman; foreman must reply within 3 days; (2) if matter remains unsettled employee submits grievance in writing to union employee committee and latter group, if it believes the grievance is meritorious, may take up the grievance with the local company superintendent or his representative who have 10 days to reply; (3) in event that the superintendent's reply is not satis-

[1] The numbering of the steps is my own and is not the exact format in the contract. However, it is believed that the numbering corresponds to and reflects the various steps.

factory, the president of the International Union or his designee may take up the grievance with the Company's Director of Industrial Relations or his designee, who shall render a decision within 20 days; (4) if the last mentioned decision is not acceptable, a local arbitration board will be set up upon request of the president or district director of the Union; the local board consists of a person designated by the Union and a person designated by the Company; (5) in the event the two-man local arbitration board cannot agree on a decision or agree upon an impartial third arbitrator the Federal Mediation Service is contacted and the third or impartial arbitrator is selected from a panel submitted by the Federal Mediation Service; the decision of the impartial arbitrator is binding.

After the 1961 strike and following the execution of the contract Respondent applied Article IX, Section 6 of the contract, aforedescribed, to time lost during the strike. On August 23, 1961, a grievance was filed in writing by an employee at the East Chicago, Illinois, refinery. The grievance stated that because of the employee's absence during the strike his vacation pay had been reduced one-twelfth (Article IX, Section 6). The gravamen of the grievance was that the Company had denied the employee's request to work the time equal to the reduction of his vacation allowance. Under step 2, as above described, the Company's East Chicago superintendent replied to the local union representatives in writing. The reply was in detail and gave the reasons for the Company's position and denied the grievance.

It is perhaps helpful if the two positions regarding this grievance be summarized at this point. Assuming for the purposes of illustration that the employee grievant was entitled to a 3-week vacation, the Company said that the time he did not work during the strike should be con-

sidered as "time lost through absences during which an employee is not in receipt of wages" under Section 6 and Article IX. Under the same Section the one-twelfth reduction formula was applicable. Let us assume that the formula in the particular case covered or wiped out 2 weeks of the 3-week vacation. The grievant said, in effect, that he should then receive 1-week vacation with pay instead of 3 weeks and after his 1-week vacation he should be allowed to return to work. The Company took the position that under the terms of the contract it had the option to deduct from the employee either vacation time or pay. The Company had decided that it would deduct pay and not deduct time. Therefore, the Company said to the employee, you must take your scheduled and normal 3 weeks vacation but you will receive pay for only 1 of the 3 weeks. As explained in its letter to the Union on the above grievance, the Company stated that the matter of reduction of vacation allowances or pay involved not only the particular grievant but a substantial number of other employees at the East Chicago refinery; "* * * were we to permit a large number of employees to take shortened vacations—involving parts of workweeks—the resulting scheduling problems and other related difficulties would be extremely severe, and would unnecessarily burden the Company with substantial added costs and operating inefficiencies."

By letter of September 25, 1961, the Union, under step 3 of the grievance procedure, aforedescribed, appealed the grievance to the Company's Director of Industrial Relations.[1] The latter replied on October 13 and affirmed the prior detailed exposition of the Company's position. The grievance was again denied.

---

[1] "We are this day appealing the above-mentioned complaint to your office for further consideration. Enclosed you will find the necessary pertinent data concerning the complaint."

On September 25, 1961, the union committee at the Marcus Hook Refinery filed a grievance regarding the Company's application of Article IX, Section 6 of the contract to vacation pay of employees. Another employee filed a grievance at East Chicago on September 27. Grievances were filed at the Corpus Christi Refinery on October 2 and 6. All these grievances dealt with the question of vacation allowances as previously described.

On October 4 and 5, 1961, according to the credible testimony of Macauley, a member of the Industrial Relations staff in the Company's principal office in New York, a meeting was held in Chicago. Present for the Union were Schafer, a vice president of the International Union who operated out of the International's headquarters, one or more other representatives of the International Union, and approximately 15 local union committeemen from the East Chicago Refinery. The Company was represented by D'Alessandro, the Director of Industrial Relations, and by about four management people from the East Chicago Refinery, as well as Macauley. One of the matters discussed was the meaning and intent of Article IX, Section 6, of the contract. Apparently there was some reference made as to what the transcript of the 1949 contract negotiations showed, when the provision in question first appeared in the contract. Macauley testified that both parties had received copies of the aforementioned transcript. In any event, there was no demand for or refusal of records or matters of that nature nor does issue appear to have been drawn between the parties in Chicago on any item or items other than the basic fact that the Union did not agree with the Company's position on Article IX, Section 6.

Having received the Union's appeal on September 25, 1961, from the superintendent's decision on the original

East Chicago grievance, the Director of Industrial Relations, as we have seen, by letter of October 13, 1961, advised the Union that he agreed with the position and the reasons set forth by the superintendent regarding the grievance and he denied the grievance. On November 28, the Union advised the Company that "we wish to place the above-mentioned complaint in arbitration and that Mr. N. F. Schilling has been named Union arbitrator." On December 1, the Company replied and said that the Company was designating Musser as company arbitrator.

Macauley testified regarding a meeting at Philadelphia on October 19 and 20, which had been called with respect to certain problems at the Marcus Hook Refinery. The Company was represented by D'Alessandro, local management people, and Macauley. Schafer and 10 or 12 local union committeemen were present for the Union. One of the items at the meeting was the Marcus Hook grievance. The parties presented and argued their respective positions. Finally, Schafer suggested that the parties expedite the arbitration of the case and the Company agreed. By letter to Reed, acting chairman of the union committee at Marcus Hook, dated November 22, 1961, Macauley confirmed the mutual agreement to waive the appeal and prearbitration steps of the grievance procedure "in order that the arbitration of said complaint, as provided in article XXVI, section 7 of the agreement, may be expedited." This will confirm your advice that Mr. John R. Bullard will serve as the union arbitrator and my advice to you that Mr. C. D. Musser is appointed the company arbitrator." Reed acknowledged receipt of the above letter on November 22, 1961. By letter of November 22, to

---

[1] Schafer did not testify at the instant hearing.

[2] Section 7 provides for the designation of a union arbitrator and a company arbitrator by the respective parties.

the Federal Mediation Service, signed by Musser and Bullard, the Service was advised that the two arbitrators "have met and have been unable to resolve the above mentioned grievance which has arisen under the terms of the contract." The letter asked that steps be taken to designate a third arbitrator as provided in the contract. The Director of the Federal Mediation Service advised the parties by letter of January 10, 1962, that Loucks was appointed arbitrator "to hear and decide the matter [the Marcus Hook grievance] in dispute."[5]

Loucks wrote to Musser and Bullard on January 13, 1962, regarding time and place of hearing. On January 15, the Union notified D'Alessandro that it had selected Young to replace Bullard as union arbitrator. Musser wrote Loucks on January 19, with copy to Bullard and Young, discussing time and place of hearing, and advising receipt of information that Young had been substituted for Bullard. On January 31, 1962, Young wrote to Loucks, copy to Musser, that the Union did not wish to proceed to hearing on the date previously discussed; the reason for this was because the Union said that it wished to give serious consideration to a company suggestion that, since the same issue was involved in other grievances, "time and money could be saved if all these grievances could be disposed of in one single arbitration."

Having described the status of the original East Chicago grievance and the Marcus Hook grievance, same ref-

[5] Although the third arbitrator was in terms one of three arbitrators or the third arbitrator, he was in effect *the* arbitrator. The company and the union arbitrators were admittedly partisans. When they could not agree on the resolution of the grievance, the matter went before the impartial arbitrator for decision. In the proceeding before the impartial arbitrator, the two partisan arbitrators represented respectively, the Company and the Union, and they were, in practice, at that stage, representatives or advocates for those whom they represented.

erence is appropriate to the other grievances. The second East Chicago grievance of September 27, 1961, was processed up to and including the Company's Director of Industrial Relations who denied the grievance on December 21, 1961. The same is true of the October 2, 1961, Corpus Christi grievance which was denied by the said Director on December 15, 1961. On December 15 the Union advised the Company that it wished "to proceed to arbitration" on the Corpus Christi grievance and named Fausler as union arbitrator. The Company named the company arbitrator on December 27. Letters were thereafter exchanged regarding times and dates for the two arbitrators to meet. Substantially the same description applies to the October 6 Corpus Christi grievance and the Houston grievance of October 19, 1961.[6] On February 27, 1962, the Union again advised the Company that it wished to proceed to arbitration on the Houston grievance and asked the Company to designate the company arbitrator.

If we now retrace events for a few weeks, we find that the Sinclair Nationwide Council of the Union met in Houston on January 27, 1962.[7] The matter of the vacation deductions of employees that was taking place, was important and the delegates of the Council considered the problem. At the time of the Council meeting the Marcus Hook grievance had been processed to the stage where Loucks, an impartial arbitrator, had been selected and where dates for the hearing before Loucks were under

---

[6] The Union advised the Company on December 26, 1961, that it had designated Attorney Wolf as union arbitrator for the Houston grievance and that "the Union desires to proceed to arbitration with the above grievance."

[7] The Council is composed of employee representatives of 23 local unions covered under the Master Contract between the Company and the Union.

consideration. The delegates from the various refineries considered the matter of vacation deductions of such importance that they were dissatisfied with the fact that the Marcus Hook grievance, a potential or actual precedent making grievance, was proceeding to final arbitration, with less than a highly skilled man representing the Union. In short, the union arbitrator, who was scheduled to represent the union position before Loucks, was a rank-and-file employee from the Marcus Hook Refinery and not a skilled advocate. After discussion, representatives of the Council contacted Attorney James Wolf on January 29 and asked him to act as the union arbitrator.[1]

Jenkins, an international representative of the Union, testified credibly that when Wolf was contacted and retained pursuant to the aforementionad events, Wolf asked the delegates present about the past history of vacations under Article IX, Section 6 of the contract. The delegates said that to the best of their knowledge no employee had previously been placed on vacation without pay. Thereafter, in order to secure more precise information along the lines of past history, Jenkins, quite evidently at Wolf's request, sent letters to the union committee chairmen at all the refineries "asking them if they could develop facts in reference to incidents where employees suffered vacation penalty." The net response from the chairman was that it was impossible for them to contact the several thousand of individual employees and thus develop a thorough record. It also appears that the Union had no records of its own that would give the type of information desired.

On February 2, 1962, a conversation took place be-

[1] The Council delegates had also decided to recommend consolidation of the cases and to pay the cost of arbitration. These matters were subsequently adopted and ratified.

tween D'Alessandro and Schafer.* The nature of this conversation and developments therefrom is revealed by a letter of February 5, 1962, from D'Alessandro to Schafer. The letter confirmed the February 2 conversation involving Article IX of the contract and the Marcus Hook grievance and the other grievances relating to the same situation. The writer then went on to recall the Philadelphia discussion on October 19-20, 1961, about the Marcus Hook grievance, "at which time and at the Union's request, the parties agreed to expedite arbitration of said complaint in light of the disagreement with respect thereto. Accordingly * * * the Master Agreement's appeal step was waived." Then follows a recounting of the selection of Loucks as impartial arbitrator and the continuing efforts to arrange a time and place of hearing. The letter refers to the fact that since the other grievances arise in the same circumstances, "we advised you during our conversation of our willingness to consolidate with the aforesaid Marcus Hook case * * * before Mr. Loucks; all vacation application complaints now outstanding * * *." There is then enumerated the other grievances that would be consolidated (two from East Chicago; one from Houston; three from Corpus Christi). "Since union desires to expedite this matter and since article XXVI has already been employed to select the arbitrator for the Marcus Hook case, we believe the procedure outlined herein will permit prompt resolution of the outstanding complaints." Reference is then made to the fact that this proposal is con-

---

* Although neither D'Alessandro, the Company's Director of Industrial Relations, with his office in New York, nor Schafer, vice president of the International Union, with his office at union headquarters in Denver, were the highest officers in their respective organizations, they were, on the type of matters involved herein, for all practical purposes the two top men with which the Union, on the one hand, and the Company, on the other, dealt.

sistent with prior situations in which related grievances were consolidated before one arbitrator, and it is stated that "under our Master Agreement relationship the determination by arbitration of an issue under said agreement at one operation or location has application to the same issue at other covered locations." The penultimate paragraph and the last on the basic subject of the letter is: "will you please promptly advise us of the Union's position on the procedure outlined herein and the presentation of the issue."

On March 23, 1962, Schafer sent the following telegram to D'Alessandro:

> I am now prepared and willing to consolidate the arbitration cases mentioned by number in your letter of February 5, dealing with the matter of vacation penalties from your Marcus Hook, East Chicago, Houston, and Corpus Christi refineries. We are agreeable that this case be heard before Mr. William Loucks at the agreed-to place of Kansas City, Missouri. Further understood that each party will plead its own case and contentions. We are now substituting Mr. James P. Wolf [address] as Union's arbitrator to replace Mr. James L. Young * * * I suggest your arbitrator contact Mr. Wolf so they may work out final arrangements with Mr. Loucks.

2. The events subsequent to March 23, 1962.

On April 11, 1962, Wolf made the first union demand on the Company for the production of records. In a letter of that date to Musser, the company arbitrator, Wolf replied to a letter from Musser. Because of other engagements, Wolf stated that he could not "undertake arbitration of the above captioned grievances" [all the vacation grievances previously described] in May. Wolf said that he understood that all the grievances "have been con-

solidated into one arbitration case." He suggested that he and Musser meet to work out some of the problems that could arise in submitting the cases to the arbitrator at a point removed from the various plant locations. "In addition * * * I feel that we, as the local arbitration Board, should meet to explore all of these cases to see if there is any possibility of a mutually agreeable decision. Here again, I am not fully informed as to what has occurred in the past."

> "Before meeting, however, it is my opinion that we must both have certain information before us which I regard as material and essential to the determination of these grievances. I refer in general, to the past practice in cases where employees did not receive their full vacation allowance due to loss of time in excess of twenty-two scheduled work days * * *. The key question as to any case where a loss in vacation allowance or pay occurred because of the penalty provision in section 6, is how the cases were handled. Specifically, I refer to when the employee started his vacation and when he came back to work by dates to be compared with the exact vacation allowance he would have been entitled to if no penalty had been assessed. This material is in your personnel and plant records and wholly within your control; however, it is essential that we both have access to it to evaluate the grievance * * * and for the further reason that the records on this point may warrant a determination that the grievance should be settled or withdrawn."

The letter went on to suggest that the union committee at each plant be given access to the records for copying or that a joint union and management committee make an abstract of all pertinent cases. It was stated that the Union would bear the expense of copying records. "Once these facts are developed, I suggest that we meet and consider them together with the consolidated grievances with

a view to disposal of them by mutual agreement, if at all possible. In the event we are unable to agree, we can then proceed to work out our procedure on the consolidated cases."

Musser answered Wolf on May 2, 1962. He stated that it was his impression "that the Union had already evaluated the cases in terms of its desire and readiness to proceed to immediate arbitration * * *." Musser then referred to D'Alessandro's letter of February 5 and Schafer's telegram of March 23, as reflecting "the parties' agreement to proceed to arbitration and to consolidate the seven listed complaints * * * for hearing before Mr. Loucks * * *" and stated, "I believe this covers your question as to consolidation * * *. I believe it also covers the matter of prior adjustment efforts and of the submission." The letter then stated:

> The contract vacation application made in connection with the 1952 strike is a matter of record which, as I understand it, is within the knowledge and possession of the locals and the international union. The application made in connection with the 1961 strike is set forth in the answers to the complaints [grievances] and the facts * * * are also within the Union's knowledge and possession. Further, the matter of the application of vacation policy procedure in general was discussed in a letter to International Union Representative Jenkins under date of September 20, 1961, and, I think, answers your inquiry with respect thereto * * * review of the record of each individual employee having such a deduction is not necessary to the determination of the issue.[10]

[10] Musser's reference, above, is to a letter written on September 20, 1961, from D'Alessandro to Jenkins in response to a letter from the latter regarding Article IX, Section 6. In his letter, D'Alessandro referred to Treasury Department Instruction 14, first issued by the Company to its own staff in 1949, with

(Continued on following page)

The letter then repeats that as a result of discussions with Schafer and Jenkins the Company believed that the Union had "determined to seek review of its position in formal arbitration and against withdrawal of the complaints [grievances]." Musser said, however, that if the Union, on the basis of information referred to, wished to, it could withdraw the grievances. "In the light of the foregoing, I see no need for our review of such records at the plants or for conferences between local management and union representatives as you suggest." Musser said that he was prepared to meet with Wolf at a prearbitration conference, however.

On May 24, 1962, Rentfro, general counsel of the Union, wrote to Musser. He stated:

> * * * it is our position that neither the contract language nor many years of past practice supports the Company's unilateral determination in this case to force an employee to take a longer vacation than that for which he is being paid * * *. Previous application of section 6 to time lost without pay is crucial information needed by the Union.

It was then stated that the information requested by Wolf was material and essential and that it was in the possession of the Company and not in the Union's possession. The information was again requested. "It would greatly facilitate the handling of this matter and is essential information to be evaluated by the Union Arbitrator prior to his

---

(Continued from preceding page)

a copy to the Union. The instruction dealt with the manner in which various sections of the contract were to be applied. In the section dealing with "Vacations" it is stated that if an employee lost in the aggregate 22 working days "the employee's vacation time or wages is to be reduced one-twelfth * * *." Also, in his letter to Jenkins on September 20, in addition to the reference to the Treasury Department Instruction, D'Alessandro said that "Company has the option to make the appropriate deduction from an employee's vacation allowance * * * or his vacation pay * * *."

meeting with you as company arbitrator to explore a possible agreement or decision."

Musser answered Rentfro, with copy to Wolf, in an extended letter of June 12, 1962. It was stated:

> It would clearly appear that the information possessed by Messrs. Schafer and Jenkins, reflected in part by your reference to 'many years of past practice,' local union officers, and complaints in the Union's files * * * the matter of vacation policies and applications as discussed in prior negotiations and the two Sinclair Master Agreement Vacation case awards (Klamon and Quinlan), the union arbitrator has or has available to him through these sources the relevant and necessary information for his evaluation and for trial of these complaints.[11]

---

[11] The Klamon award referred to by Musser was a decision by an arbitrator of that name in 1949. Briefly stated, there was involved therein a grievance regarding the Company's right to require an employee's vacation to start on a Monday and the Company's right to require an employee substituting for another to work the same hours as the latter. Apparently, the portion of the decision that Musser considered relevant (although he did not point this out) was the following portion of the decision: "The Company does have every right unilaterally to schedule vacations in such a manner as to comply with the terms of the contract * * * and * * * to minimize the necessary financial burden. In the absence of a clear affirmative provision in the Master Agreement contrary to the foregoing there does not appear to be any basis whatever, in the present agreement between the parties upon which the contention of the Union can possibly be sustained."

The Quinlan award was handed down in 1960 by Arbitrator Quinlan. It dealt with the subject of vacation scheduling. Here again, although not pinpointed by Musser, he evidently believed that the following language was pertinent: "The fact that the previous vacation scheduling policy existed for twenty-five years prior to the 1960 change makes understandable the Union's feeling that they had a vested right or interest in such policy. However, arbitrators have almost unanimously held (and this arbitrator believes correctly) that where a past practice which originated solely through the exercise by management of a proper managerial prerogative, that this could not be properly construed as vesting a right in the employees thereby, and that management has the same discretionary right to change the practice which it had in establishing it."

Among other things, Musser discussed a prior case involving the parties which Rentfro had cited in his letter. He then stated:

> Here, as in the above-referenced Corpus Christi case, Company is ready and willing to submit this matter of contract interpretation and the production of relevant and necessary information which may be available to the Impartial Arbitrator. We have been so willing to proceed to arbitration promptly since shortly after the meeting with Mr. Schafer and union on October 20th at Marcus Hook when the Union advised, in light of a basic disagreement on contract interpretation, that it desired to so pursue the matter expeditiously. The Company has never to my knowledge * * * declined at the hearing to furnish or make available any relevant and necessary information when requested by an Impartial Arbitrator, nor will it do so in this case * * * I suggest that if Mr. Wolf finds a 'pre-arbitration' meeting necessary and desirable to clarify this or other aspects of this matter, he contact me with reference to such meeting * * *.

Wolf wrote a long letter to Musser on August 6, 1961. He dealt with the Company offer to produce records at the arbitration proceeding and said that this was "a negation of the concept that the grievance procedure before arbitration is a vital part of the collective bargaining obligation." The letter said that if the Company persisted in its position it would be necessary to file unfair labor practice charges. It was stated that the Company had "never given us a clear-cut answer or refusal to furnish the material requested * * *. Accordingly you are again requested to make available all plant and personnel records for the past ten years which show continuous service and absences during which an employee is not in receipt of wages for employees in the bargaining unit. If you keep specific records on vacation allowances, we also

request access to these records for the same period * * *. We are interested in past practice on vacation allowances." Wolf denied that the Union had the necessary information. He referred to the fact that D'Alessandro in his letter to Jenkins on September 20, 1961, had stated, in justification of what the Company had done on vacation deductions after the 1961 strike, "that the historical applications and interpretations herein set forth are fully consistent with the requirements of Section 6 and at the same time are reasonable and fair * * *." Wolf stated that it was those very historical applications and interpretations that the Union was seeking. He said that "my information in this regard is completely at variance with Mr. D'Alessandro's statement. But there is no need to have a disputed issue of fact on this since the records will show exactly what has been done in the past in regard to vacation penalties. This is the crux of the matter * * *."

Musser, on August 21, 1962, replied to the above letter from Wolf. Musser referred again to the Company's belief that the Union had wished to expedite arbitration but said that with Wolf's advent the matter had come to a halt, a result that could have been avoided if Wolf had submitted his request to the arbitrator in the arbitration proceeding. It was also stated:

> We have emphasized that your request involves the contract interpretation question to be decided by the Impartial Arbitrator, i.e., Union's interpretation as against the Company's interpretation, and, accordingly, therefore, we decline your request to now make available to the Union in advance of the hearing extensive records and data which we do not regard as necessary to a determination of the cases.

The Union filed the instant charge on September 26, 1962. Wolf had written to Musser on September 21 explaining that the Company's stand had necessitated the

filing of charges and "also left us with no alternative other than to proceed to arbitration since it is obvious that the Union and/or its representatives cannot function intelligently in the absence of the needed data."

On October 9, 1962, Wolf wrote to Loucks advising him that he was filing with Loucks a motion for the production of certain records and/or copying. The enclosed motion requested an order from the arbitrator requiring the Company to produce and to permit the Union to inspect or copy "all accounting and personnel records which show continuous service, absences with and without pay and all records specifically vacation pay, allowances and penalties or reductions for the years of 1961[12] through and including 1962, for all employees within the Refining Company bargaining unit" as defined in the contract. It was also moved that production of the records be ordered for at least 2 weeks before the arbitration hearing in order to afford the Union a reasonable time to inspect or copy. In the letter to Loucks, accompanying the motion, Wolf had said that if the records were not produced prior to the hearing the Union would renew its motion at the hearing together with a request for 2 weeks' continuance in order to inspect and copy the records.[13]

The Union's motion for production of records was argued by Wolf and Musser before Loucks on November 16, in Philadelphia. Wolf, of course, argued for the motion and Musser against. Loucks did not rule directly on the motion nor did he issue an order. After hearing the arguments, Loucks indicated that he believed that the Union's

---

[12] This was a typographical error and the year intended was 1951.

[13] During the course of letter writing between Wolf and Musser and Rentfro, previously described, dating from April 11, 1962, each writer had sent a copy of his letter to Loucks, who was thus presumably not unfamiliar with the situation that existed.

request "for records, rather comprehensive in their coverage for all those installations going back some ten years" would have to be dropped. Musser had stated that substantially all the company records were not available for a period of more than 5 years back. Loucks gave some indication that he thought records going back about 3 years would be sufficient. Loucks then suggested that the Union proceed to show what it alleged constituted a past practice of the Company regarding deductions and that the Union do this with such evidence as was available to it. Loucks stated that he realized that the Union did not have records of this past practice such as the Company had in its possession and therefore the evidence from the Union was not expected to be all embracing for each refinery. In reply to a query by Wolf, Loucks, with the concurrence of Musser, said that if a local representative of the Union testified that he had spoken to employees at a particular refinery regarding instances of Company past practice and the representative testified at the arbitration hearing as to what he had thus ascertained regarding past practice, the testimony would not be excluded as hearsay. Loucks also stated that if, after the Union had put in its evidence of asserted past practice as best it could, he, Loucks, felt that the evidence created a presumption that there was a past practice of the nature claimed by the Union, he would then feel that it was incumbent upon the Company, in order to rebut the presumption, to come forward with rather comprehensive data. In view of the fact that the Company had certain records in its control and possession, Loucks indicated that he believed that the burden of rebuttal could not be sustained by the Company with the same type of catch-as-catch-can evidence as the Union might have been allowed to develop.

The arbitration hearing was thereafter held in Kansas City in two sessions, January 31, February 2, and March

9-12, 1963. The Union introduced testimony of employee union representatives from the various refineries. They cited specific instances in the past where employees, who had sustained vacation penalties, had been permitted to work the time reduced and had not been obliged to take their full vacation time without pay including the part of the vacation time that they had lost by penalty.

The Company presented, through witnesses, a tabulation purporting to show all vacation deductions made under Article IX, Section 6, since 1956. The tabulation was based on company records and it showed whether the deduction had been made in vacation allowance or wages. The witnesses testified regarding their respective roles in preparing the tabulation and the original records on which the information was based was offered to Wolf for cross-examination. Generally speaking, Wolf's position in the course of the hearing was that records should be made available to the Union and to him earlier than at the end of the Company's direct examination of witnesses. His position is further illustrated, as is that of the arbitrator and the Company, from the following excerpt from the transcript of the hearing:

> [There had been a colloquy about some records relevant to a Company witness' testimony.]
>
> Mr. Wolf: Now when I say the records, I mean all the records. I don't mean a few records fished out of all of it. We would like to take a look at all of them.
>
> Mr. Loucks: I think we will have to meet this point when we come to it. Mr. Musser, I think, is taking the position that he ought to be permitted to offer what he wants to firs. and then as always it will be the privilege of the Union to make a motion for something more.

There was an instance where the parties agreed at the hearing that two union representatives could examine

records of the Houston Refinery in advance of cross-examination but the agreement also provided that the aforesaid representatives would not communicate with Wolf until 30 minutes before Respondent's witness was to take the stand. This agreement was carried out. Apparently the Company produced no records relating to vacation penalties assessed against employees as a result of layoffs although the Union's testimony had dealt in part with such situations. As far as appears, the Company's position was that layoff matters came under Article IX, Section 5 of the contract and were not germane to Section 6 matters that were involved in the arbitration.[14] Notwithstanding its expressions of position on various aspects of the evidence at the hearing before Loucks, the Union did not request additional records from the Company although advised by Loucks of its right to do so and it did not renew the motion for records, previously made to Loucks before the hearings.

3. Analysis and conclusions.

Since the facts have been set forth in detail heretofore, it is unnecessary, at this point, to repeat them with the same amplification. The evidence of the events up to and including March 23, 1962, persuades me that there is no conduct of the Respondent in that period that is violative of the Act. Without commenting on the merits of Respondent's position regarding vacation deductions, I am of the opinion that Respondent fully performed its obliga-

[14] Section 5 reads: "Any employee laid off through reduction of forces or for any reason beyond his control and reemployed within one (1) year shall be considered a regular employee in regard to vacation rights but shall forfeit one-twelfth (1/12th) of his vacation pay for each month lost during the year. No employee shall be forced to take his vacation due to a shutdown.". See section 6 previously set forth in this Report.

tions both under the Act and under the grievance machinery of the contract. Respondent explained its position, not only in writing at the various steps of the grievance procedure, but also met with union representatives on several occasions to discuss the vacation deduction policy. Basically, Respondent's position was that under Article IX, Section 6, of the contract it had the option to deduct either vacation time or wages where deductions were called for by the contract. Various employee grievants and the Union disagreed with this position of the Respondent.

The Marcus Hook grievance had been processed through the grievance procedure to and including the last step. The two partisan arbitrators, representing the Union and the Company, respectively, had agreed that their positions could not be reconciled and that the matter would have to be resolved by a third party. They therefore had taken the contractual steps to place the entire matter before an impartial arbitrator. The latter, Loucks, was designated "to hear and decide the matter in dispute." Steps were taken to fix a time and place of hearing. The hearing did not come to immediate fruition because the Union was considering the Company's suggestion for consolidation of the other grievances on the same subject. Another reason for delay was that the union arbitrator in the Marcus Hook case, who would represent the Union in the hearing before the arbitrator, was a rank-and-file employee. The various delegates in the Union's Nationwide Council were concerned that the aforesaid union arbitrator from Marcus Hook was less than the best man to represent the Union in the arbitration hearing. This deficiency was remedied by substituting Attorney Wolf as the union arbitrator in place of the Marcus Hook arbitrator and by deciding that all the grievances would be consolidated with the Marcus

Hook case, with Wolf thus becoming the union representative in the consolidated hearing before Arbitrator Loucks.

The evidence warrants the conclusion that when the other grievances were consolidated with the Marcus Hook case the consolidated proceeding was at the stage, previously described, of the Marcus Hook case. The consolidated case was at the stage of arranging a time of hearing with the appointed arbitrator, Loucks, and with Wolf as the union arbitrator who would, with Musser and Loucks, work out the details of time of hearing and who would, as an advocate, represent the Union at the hearing. The March 23, 1962, telegram of Schafer to D'Alessandro, as well as other evidence, fully bears out the aforesaid observations. Schafer's telegram states that the Union is agreeable to consolidation and to have the consolidated case heard before Loucks and "each party will plead its own case and contentions," with Wolf representing the Union. Schafer suggested that Musser contact Wolf "so they may work out final arrangements with Mr. Loucks."

As previously indicated, the evidence persuades me that over a period of 7 months the parties had evaluated their positions; they had bargained, discussed, and explained their positions to each other and they had been unable to resolve their differences. Their basic point of disagreement was over the Respondent's position that by the terms of the contract it had the option to do what it had done regarding vacation wage deductions and the Union's disagreement with this position. Both parties were in full agreement that they had, in effect, exhausted all avenues of their contractual grievance procedure and that the matter should be resolved by an impartial arbitrator. The latter was selected and details for the hearing were under discussion.

Quite apart from various legal views as to the rela-

tionship of the Board and the Act to contractual grievance and arbitration provisions and proceedings, there is a persuasive practical and equitable logic for concluding that parties, who have contractually provided for arbitration and who have in a particular case followed the procedures of the contract and have in the same case approved and agreed on arbitration as the means of resolving their disagreement, should proceed to do this very thing. A corollary or an inherent part of this line of thought is, that having arrived at the arbitration stage, the parties should refer to the arbitrator problems of procedure and evidence that then arise and that these matters are the concern of the arbitrator and no one else.

The instant case is one where the demand for records was made for the first time on April 11, 1961, well after the grievance had reached the posture I have previously described, i.e., after exhaustion of the grievance procedure and after the decision to arbitrate and the selection of the arbitrator.[15]

Approaching the matter from a slightly different angle we can consider various views about the relationship of Section 8(a)(5) of the Act and the obligations of the parties thereunder. Conceding that the obligation to bargain is a continuing process, one line of thought is that when the parties have agreed contractually on a grievance procedure with binding arbitration, the bargaining

---

[15] What parties have done is a fact. The fact of what the parties did prior to April 11, 1961, is one thing and is not altered by another fact, namely that they could thereafter presumably do a number of other things. Nor is the fact of what the parties had done in 7 months, including March 23, 1961, altered by another fact, the substitution of Wolf as union arbitrator or representative. If, today, Attorney X was substituted for Wolf as union attorney, it would not alter the facts in the case or place him in any position except in the shoes of Wolf as to past events, although his views or approach or interpretations might differ as to present or future action.

obligation has been channelized into the grievance and arbitration procedure and the bargaining obligation is fulfilled by the functioning of the grievance arbitration procedure. Since the parties have agreed that the arbitrator's decision shall be final and since he must decide about the sufficiency of the evidence necessary for a fair decision, questions of the necessity, relevancy, and materiality of evidence are for the arbitrator and by the nature of the arbitration process and the inherent power stemming from the arbitrator's authority to render a binding decision, he has the power necessary to his function. This view would of course reject the Board or the courts as either monitors or auxiliaries of the grievance arbitration process.

Another line of thought, stressing the preeminence of the Act over any private arrangement or contract and emphasizing the continuing obligation to bargain, would have the Board and the courts pass upon and insure the same conduct by the parties in a grievance arbitration context as in situations where such a grievance arbitration contract did not exist. The Board would, in effect, monitor the grievance arbitration process and would pass upon the conduct of the parties therein, including the necessity, materiality and relevance of evidence, and leave to the arbitrator the function of rendering a decision on the record thus monitored by the Board.

Another approach would hold that the parties must bargain in their direct dealings with each other during the grievance processing stage and the Board will apply its statutory standards to their conduct. But when the two parties have exhausted the grievance procedure stage, where they are the sole participants, and the matter has come to the arbitration stage, the Board will leave the parties to their chosen forum, the arbitrator. On such matters as demands for data or records at the grievance

stage, the Board will decide whether the material is relevant and necessary and required and whether or not nonproduction of such records warrants a conclusion that there has been a violation of Section 8(a)(5) of the Act. Or, perhaps, the Board can pass on relevance and necessity in a less definitive manner and state that the records or data sought are reasonably or arguably relevant or are not clearly irrelevant. Thus, on matters of Federal or State jurisdiction the Supreme Court has adopted such a test of reasonable arguability.[18]

Coming back to the evidence in the instant case, we find that the first requests by the Union for records occurred on April 11, 1962, and thereafter. Wolf and Rentfro in such requests spoke of the need to have the records in order to evaluate the grievance, i.e., to decide whether the grievance issue in the consolidated case was or was not, in the Union's opinion and from the Union's standpoint, valid or supportable or whether it should be "settled or withdrawn."

I assume that a grievance can be settled or withdrawn at any stage and I also assume that, whenever a party re-

---

[18] "We need not and should not now consider whether the petitioner's activity in this case was federally protected or prohibited, or any of the theories suggested above or on some different basis. It is sufficient for present purposes to find, as we do, that it is reasonably 'arguable' that the matter comes within the Board's jurisdiction." *Local 100 of the United Association of Journeymen and Apprentices v. H. M. Borden*, ___ U. S. ___, June 3, 1963. To the same effect, *Local 207, International Association of Bridge, Structural and Ornamental Iron Workers Union v. Jacob Perko*, ___ U. S. ___, June 3, 1963. Cf. *Yawman & Erbe Mfg. Co.*, 187 F. 2d 947 (C. A. 2), to the effect that in contract negotiations a union is entitled to data unless "it plainly appears irrelevant." It is a further step to conclude that failure to produce arguably relevant material or material that is not clearly irrelevant constitutes a violation of Section 8(a)(5) of the Act. *N. L. R. B. v. Truitt Mfg. Co.*, 351 U. S. 149; *N. L. R. B. v. Woolworth Co.*, 352 U. S. 938; *N. L. R. B. v. American National Insurance Co.*, 343 U. S. 395; *N. L. R. B. v. Insurance Agents Union*, 361 U. S. 477.

ceives additional information bearing on a matter in issue, it evaluates the information and evaluates its position in the light thereof. But I am not persuaded that the Union and the Company had not thoroughly evaluated their positions well before April 11, 1961. I am also of the opinion that the grievance was not at the stage where, after appeal to the Director of Industrial Relations, the parties then appointed a union arbitrator and a company arbitrator, respectively, and the two arbitrators were to meet and discuss the grievance and, then, if they could not agree on a settlement of the grievance, they were to take steps to secure an impartial arbitrator. These steps had been taken and the arbitrator had been selected to hear and decide the issue. It is unnecessary to decide, I believe, whether, in view of all the circumstances and viewed realistically, the requests for records were more in the nature of a discovery attempt in preparation for the arbitration hearing rather than a request for data for bargaining purposes. I assume that Wolf, who personally entered the picture after the Union and the Company had decided upon arbitration, in good faith believed that he needed the records and that they would be helpful and that he would use them in his client's interest in discussions with the Company and/or at the hearing.

But if we now posit the the entire situation in a manner more favorable to the General Counsel and the Union and assume that it is too rigid an application to say that the merits of the Union's requests for records should be affected by the time of the requests or by past events, we have the following considerations: [17]

[17] Although, in its responses to the requests for records the Company repeatedly said that it was of the opinion or believed that the Union had previously evaluated the grievance and had determined on prompt arbitration, the Company also gave additional reasons why it considered the records irrelevant and unnecessary.

The Company's basic position was that under the terms of Article IX, Section 6, of the contract, it, in its discretion, had the option to deduct wages or time in effectuating vacation penalties; that past practice was irrelevant since, as it believed, its interpretation of the contract was correct. Morever, according to the Company, past practice, as the Union knew, was consistent with the Company's 1961 action, and, in any event, the Company would abide by the arbitrator's rulings as to evidence sought by the Union. The Union asserted that "it is our position that neither the contract language nor many years of past practice supports the Company's unilateral determination in this case * * *."[18] But the Union said that it wanted the complete records in order to evaluate them and possibly to reach agreement with the Company or withdraw or settle the grievance.

As I understand the existing law, a violation of Section 8(a)(5) of the Act may be found where, in the circumstances of the case, it is found that a refusal to produce relevant and necessary data is evidence from which it may be concluded that there has been a refusal to bargain in good faith.[19] The General Counsel and the Union argue that such a finding should be made in this case. All parties were at great pains to impress upon me at the hearing that I should not pass upon the merits of the grievance in dispute and that the merits were not before me. The General Counsel and the Union have vigorously argued that the data sought by the Union was relevant and necessary to the grievance issue. Thus, in his brief the General Counsel asserts that the grievance "challenged the Company's application of Article IX of the National Agree-

---

[18] Rentfro's letter of May 24, 1962, *supra*. Wolf said substantially the same thing in his letters.

[19] *N. L. R. B. v. Truitt Mfg. Co.*, 351 U. S. 149. *N. L. R. B. v. Woolworth Co.*, 352 U. S. 938

ment" and "the relevancy and necessity of the information sought by the Union cannot be seriously questioned" because it would enable the Union "to intelligently process and evaluate the grievance * * *."[20] If the Company's interpretation of the contract, namely, that Article IX, Section 6, "* * * an employee's vacation allowance or wages shall be reduced one-twelfth (1/12th) for each twenty-two (22) work days of absence," means that the Company has the option to reduce vacation allowance or wages, is correct, the relevancy and necessity of records showing instances of how the option had been exercised in the past is at least open to question. Apparently because of their position (and the Company's) that the merits of the grievance were not before the Examiner, the General Counsel and the Union have not told me exactly how they interpret the contract. I know that the Union did not agree with the Company's interpretation and I believe that their position, at least in part, was and is that the employee and not the Company had the option of taking either a lesser number of days in vacation with pay or of taking his full vacation number of days but without pay for some of the vacation thus taken; or their position was and is that the contract is ambiguous.[21] Rele-

---

[20] Kentfro, in his May 24, 1962, letter stated, "* * * among other things, the Union is challenging the method used by the Company and the interpretation placed by the Company in applying Section 6 of Article IX of the Master Agreement."

[21] It is probable that the Union is also taking the position that Article IX, Section 6 does not apply to strike situations ("* * * the Union had reason to believe that the Company was infringing upon employees' contractual rights by considering absences due to strike in reducing vacation * * *." General Counsel's Brief, p. 7.) Apparently, prior to 1961, there had been a strike in 1952. Both parties appear to have known what the Company did regarding vacations in the immediate poststrike period in 1952, with the Company, in 1962, arguing that the past had nothing to do with its right under the contract to exercise its option.

vancy and necessity of records of past practice is thus dependent upon a number of considerations.

Although in the *Hercules Motor Corporation* case[**] the Company took the position that the Union was not entitled to certain data and access, on the ground that the purpose of the grievance and the data and access was to protest the fairness of the rate set by Respondent whereas the Union's right under the contract was to question only whether the rate was fixed in accordance with past practice, the basic issue, as stated by the Board, was that "the Union's grievance involved a dispute concerning interpretation of the contract provisions * * *." In the instant case, also, the grievance involved a dispute concerning interpretation of the contract provisions. As in *Hercules* "the contract provides machinery devised by the parties themselves for settling such dispute." In my opinion, the rationale of the *Hercules* case is applicable to the instant case and "it would not effectuate the policies of the Act for us to intervene in the case." The rationale is not applicable to situations where information is relevant to a union's task in negotiating a contract or where the union bargaining agent and the employer do not have a grievance arbitration procedure in their contract; but, where the grievance involves a dispute concerning interpretation of the contract, I am unable to see why a statement of the employer (who can say what he wants to), that a grievance is or is not cognizable as a grievance under the contract, should affect the basic conclusion that the interpretation of the contract as to whether the dispute is a "grievance" or whether one or the other interpretation of the contract, regarding the grievance, is correct, should be left to the arbitrator under the "machinery devised by the parties themselves for settling such a dispute."

[**] 136 NLRB 1648.

There is no question in my mind that in the instant case the competency and fairness of the arbitrator should be presumed. The circumstances would be exceptional where such a presumption would not exist. Competency and fairness include the conducting of a fair and complete hearing with all relevant and necessary evidence. The power to make a binding nonappealable decision on the merits of a grievance inherently includes the power to secure relevant evidence and to draw inferences or to make presumptions according to the circumstances that occur.

The purpose of the Act, I believe, is to bring about free collective bargaining. The prohibitions of the Act and the representation machinery provided therein are all designed to bring about good-faith bargaining between an employer and the union representing the employees. The desideratum is that through this bargaining the parties will reach an agreement, a contract. The next rung to be hoped for is that they will abide by the terms of the contract. Since men of good faith can have honest differences and men of bad faith can have dishonest differences, there is only one more rung that free collective bargaining can attain. That rung is a grievance arbitration provision in the contract, providing that the terminal point of disputes will be an impartial arbitrator, selected by the parties or by machinery which they have approved, and vesting in the arbitrator binding decisional authority.

There should be no under-estimation of what the parties have ceded to the arbitrator when they place an arbitration clause in their contract. The Union has in most such instances relinquished its right to strike and has vested decisional power in a third party. The Employer has subjected its power to the decision of a third party, who will accord as much attention to what the Union

presents as to the Employer's position and, who may render a decision against the Employer or otherwise, according to standards of fairness and equity.

If it be said that the Board does not wish to impede or frustrate the grievance and arbitration procedure aforementioned but desires to facilitate it and to serve as a good right arm or auxiliary thereto, I believe that this is accomplished by not intervening in the circumstances presented by the instant case. Nor do I believe that such a result will mean that an unconscionable employer can arbitrate a union to death. It is highly unlikely that such an employer will, in the first place, agree to having an arbitration provision because of factors mentioned above regarding the significance of an arbitration clause. Further, by forcing arbitration and by not bargaining in good faith initially, the Employer (or the Union) might risk obtaining a result much worse from his standpoint than would be the case if the parties composed their dispute by reasonable compromise. The ability to secure intervention by the Board is a fertile avenue for delaying arbitration since all the steps of Trial Examiner, Board and courts are a concomitant of such intervention. This is equally true whether the intervention is sought in good faith (and I do not doubt the good faith in the instant case) or bad faith as a tactic of delay or for some other tactical reason. Denial of intervention does not cast the parties into exterior darkness or deny them a forum. It refers them to the "machinery devised by the parties themselves" for settling their dispute. The grievance arbitration procedure is the collective bargaining agreed upon by the parties.[23]

---

[23] "The present federal policy is to promote industrial stabilization through the collective bargaining agreement [footnote omitted] * * *. A major factor in achieving in-

(Continued on following page)

It is recommended that the complaint be dismissed because I do not believe that it would effectuate the policies of the Act for the Board to intervene in this case. It is also my opinion, without passing on the merits of the dispute and the contentions made concerning contract interpretation, that there has not been a violation of Section 8(a)(1) and (5) of the Act. Respondent sought to channel the bargaining process "within the framework agreed upon by the parties in their agreement" and stated that it would abide by the rulings of the arbitrator regarding production of evidence. As far as this record shows, Respondent has abided by this statement and the arbitration record was made under the aegis of the arbitrator and his rulings.

(Continued from preceding page)

dustrial peace is the inclusion of a provision for arbitration in the collective bargaining agreement.[1] * * * A collective bargaining agreement is an effort to erect a system of industrial self-government * * *. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content is given to the collective bargaining agreement. Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provision of the collective agreement." Notwithstanding duties assigned to the courts under Section 301 of the Act, a statutory duty, doubts in particular situations should be resolved in the direction of leaving all matters to the decision of the arbitrator in order "to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration * * *" *United Steelworkers of America v. Warrior and Gulf Navigation Company*, 363 U. S. 574.

[1] "Complete effectuation of the federal policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes * * * [both factors are present in the instant case]."

I do not undertake to pass judgment on what the record reveals about the instant arbitration proceeding. Whether I agree or disagree with the arbitrator's rulings or whether I would have made the same or different rulings is not important but I have

(Continued on following page)

The Conclusions reached in the instant case have been arrived at notwithstanding my belief that in such cases the disagreement of the parties should not be about facts that are contained in available records but about the significance or the interpretation to be placed on such facts. The facts should be available to both parties. It is highly desirable, I believe, in developing industrial self-government by unions and employers that facts be made available to the parties without the intervention of an arbitrator. This can be done without waiving arguments of the relevancy or materiality of such facts. However, when

---

(Continued from preceding page)

considered all the evidence in the instant record, including testimony and other evidence regarding the arbitration hearing, in reaching my decision. Since the General Counsel has commented upon various rulings and other aspects of the arbitration hearing, I will make the limited comment that, in my opinion, on the whole, a fair and adequate record appears to have been made before the arbitrator, by both parties, for a decision on the merits of the grievance to emerge. The record may not have been made in the exact manner that each party would have desired but it was made.

When parties to a contract agree upon a grievance arbitration clause, they understand, I believe, that the final step, the hearing before the arbitrator, while part of the collective bargaining package upon which they have agreed, is different from the earlier stages of the procedure. The hearing is, in effect, adversary in nature and is not the same as sitting around a table bargaining about some condition of employment or some act of the employer. If we prescind from situations where no grievance has been filed or where the stage is prior to the filing of a grievance, we can consider the situation where a grievance has been filed. Assume that no evaluation of the grievance is possible or has been made and the Union requires certain relevant data. The Union does not wish to proceed to arbitrate on the merits of the grievance in order to secure the data required. The parties, however, cannot agree on the relevance of the data. If such situations are common or important enough, there appears to be no reason why the parties cannot negotiate into their contract grievance arbitration clauses, a provision for invoking the services of an arbitrator at a preliminary stage to decide disputes of this nature. After such preliminary decision by an arbitrator, the parties could then decide whether or not to proceed to arbitrate on the merits of the grievance.

situations arise, as here, where the parties cannot agree, it is my opinion, on the facts of this case, that the arbitrator should resolve the issues.

Conclusions of Law.

Upon the basis of the foregoing findings of fact and conclusionary findings, and upon the entire record in this proceeding, I make the following conclusions of law:

1. Respondent is, and has been at material times, an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of the Act.

2. The Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. The record does not establish that Respondent has engaged in the unfair labor practices alleged in the complaint.

RECOMMENDED ORDER.

Upon the basis of the foregoing findings of fact, conclusionary findings, and conclusions of law, and upon the entire record, it is recommended that the Board enter an order dismissing the complaint.

Dated at Washington, D. C.

s/ RAMEY DONOVAN,
Trial Examiner.

STATUTES INVOLVED

Sections 8(a)(1) to (5), 29 U. S. C. § 158(a)(1) to (5), 49 Stat. 452 (1935), as amended by 73 Stat. 525 (1959):

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall

have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Section 8(d), 29 U. S. C. § 158(d), 61 Stat. 142 (1947):

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collec-

tively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

* * * * *

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a) and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

Section 10(e), 29 U. S. C. § 160(e), 61 Stat. 147 (1947), as amended by 72 Stat. 945 (1958):

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and

shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the

same shall be subject to review by the appropriate court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

Section 203(d), 29 U. S. C. § 173(d), 61 Stat. 153 (1947):

(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.